SHORT FORM ORDER

INDEX # 15340-06
RETURN DATE: **1-2-06**
MOT. SEQ. # **001**

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART XXIV - SUFFOLK COUNTY

PRESENT:
Hon. PETER FOX COHALAN

----------x
SAMUAL B ANTWI,

Plaintiff,

-against-

WILLIAM SPENCE and ARMOR RECORDS,

Defendants.
----------x

CALENDAR DATE: June 13, 2007
MNEMONIC: MG; C/Disp.

PLTF'S/PET'S ATTORNEY:

RICHARD J. SOLEYMANZADEYH
320 Nassau Blvd.
Garden City South, NY 11530

DEFT'S/RESP ATTORNEY:

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330 Broadway
Amityville, NY 11701

Upon the following papers numbered 1 to 13 read on this motion for summary judgment ; Notice of Motion/Order to Show Cause and supporting papers 1-7 ; Notice of Cross-Motion and supporting papers ; Answering Affidavits and supporting papers 8-13 ; Replying Affidavits and supporting papers ; Other ; and after hearing counsel in support of and opposed to the motion it is

ORDERED that this motion by the plaintiff, Samuel B. Antwi, for summary judgment pursuant to CPLR §3212 on his complaint seeking the sum of $50,000 plus interest from June 17, 2005 on a loan to the defendant, William Spence (hereinafter Spence), is granted to the extent of awarding judgment in the amount of $50,000 plus interest from the date of judgment. The action against the defendant, Armor Records, is dismissed.

The plaintiff instituted this action against the defendants seeking to recover the sum of $50,000.00 based upon a loan evidenced by a written agreement dated June 17, 2005. The agreement upon which the parties affixed their signatures dated June 17, 2005 states:

> "I Mr. William Spence has received a loan in the amount of $5,000.00 Five Thousand dollars on June 17, 2005 I already owe Mr. Samuel, (sic) Antwi Fifty Thousand Dollars (sic) I will pay him $50,000.00 in the event of selling my house at 15 West Jefferson Street an (sic) addition to paying him Five Thousand Dollars on July 15, 2006"

The agreement is signed by the defendant Spence and the plaintiff. The plaintiff now seeks to enforce his right to payment upon the sale of the defendant's house and moves (under the incorrect caption Samual instead of Samuel as set forth in the complaint) for summary judgment pursuant to CPLR §3212 for the $50,000 plus interest from the date of the

agreement/note. The defendant Spence, in response, attempts to argue that he was in business with the plaintiff arranging concerts and the plaintiff bought a sponsorship on a planned concert called "Get Hooked Concert" to be held at the Upper Room Christian World Center, and that the $50,000 was not a loan but a sponsorship fee. The plaintiff sought payment and the defendant refused. This lawsuit thereafter ensued.

For the following reasons, the plaintiff's motion for summary judgment pursuant to CPLR §3212 as against Spense, for $50,000 is hereby granted in its entirety but only with interest from the date of judgment since the agreement does not mention interest and interest would only flow from the date of the sale of the defendant's house. However, the plaintiff failed to address the issue of interest or the date of the sale of the defendant's house so as to calculate the interest due therefore interest is calculated as of the date of judgment. There is no evidence of liability as against the defendant, Armor Records, and therefore plaintiff's action as against Armor Records is dismissed

The function of the court on a motion for summary judgment is issue finding not issue determination. It is a most drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable. ***Elzer v. Nassau County***, 111 AD2d 212, 489 NYS2d 246 (2nd Dept. 1985); ***Steven v. Parker***, 99 AD2d 649, 472 NYS2d 225 (2nd Dept. 1984); ***Gaeta v. New York News, Inc.***, 95 AD2d 325, 466 NYS2d 321 (1st Dept. 1983). As the New York Court of Appeals noted in ***Sillman v. Twentieth Century Fox***, 3 NY2d 395, 404 (1957):

> "To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***DiMenna & Sons v. City of New York***, 301 NY 118.). This drastic remedy should not be granted where there is any doubt as to the existence of such issues (***Braun v. Carey***, 280 App. Div. 1019), or where the issue is `arguable' (***Barnett v. Jacobs***, 255 NY 520, 522); `issue finding, rather than issue determination is the key to the procedure' (***Esteve v. Avad***, 271 App. Div. 725, 727)."

It is the function of the court on a motion for summary judgment to consider all the facts in a light most favorable to the party opposing the motion, ***Thomas v. Drake***, 145 AD2d 687, 535 NYS2d 229 (3rd Dept. 1988) and to determine whether there are any material and triable issues of fact presented. The key is issue finding, not issue determination, and the court should not attempt to determine questions of credibility. ***S.J. Capelin Assoc., v. Globe***, 34 NY2d 338, 357 NYS2d 478 (1974).

However, while summary judgment is a drastic remedy, depriving as it does a litigant of his day in court [***VanNoy v. Corinth Central School, District***, 111 AD2d 592, 489 NYS2d 658 (3rd Dept. 1985)], appellate courts have nonetheless cautioned against undue

timidity in refusing the remedy. The inquiry must be directed to ascertain whether the defense interposed is genuine or unsubstantiated. A shadowy semblance of an issue is not sufficient. If the issue claimed to exist is not genuine but feigned, summary judgment is properly granted. ***DiSabato v. Soffee***, 9 AD2d 297, 299-300, 193 NYS2d 184, 189 (1st Dept. 1959); ***Usefof v. Yamali***, NYLJ 10/10/80, p.5, col.4 (App. Term 1st Dept. 1980).

Here, in the instant matter, the plaintiff has established entitlement to summary judgment on the agreement seeking $50,000 and it was incumbent on the defendant to come forward with proof in admissible form to raise a triable issue of fact. The defendant has failed to do so. The defendant merely states plaintiff bought a sponsorship with his $50,000 contribution not a loan in clear contravention of the plain language of the agreement/note signed by him. Even more damaging is the fact that the defendant avers that he signed the agreement in 2005, after he received the money the year before in 2004, at the prompting of the plaintiff. Spence signed an agreement attesting to a loan from the plaintiff, even though Spence claimed the monies provided the year before, were for a sponsorship not a loan yet he did not disavow the agreement until after he sold his house and the plaintiff insisted on payment. The defendant's arguments are without merit.

The terms of the agreement are clear and unambiguous and Spence's attempt to now disavow the plain meaning of the agreement is disingenuous at best. However, the issue of interest is denied since the agreement does not discuss an interest date and the agreement calls for payment upon the sale of Spence's house which date is not set forth in the papers. Thus the request for interest from the date of the agreement is denied. The interest will be calculated from the date of judgment only. As has been stated so many times in the past, mere conclusions, expressions of hope or **unsubstantiated** allegations or assertions are insufficient to defeat a party's request for summary disposition. V. ***Savino Oil and Heating Co. Inc. v. Rana Management Corp.***, 161 AD2d 635, 555 NYS2d 413 (2nd Dept. 1990); ***Dabney v. Ayre***, 87 AD2d 957, 451 NYS2d 218 (3rd Dept. 1982). See, also, ***Marine Midland Bank N.A. v. Idar Gem Distributors, Inc.***, 133 AD2d 525, 519 NYS2d 898 (4th Dept. 1987). The claims against the defendant Armor Records is denied since the agreement was signed by Spense personally and not Armor Records and therefore as to that defendant the action is dismissed since Armor Records does not appear in this claim anywhere in the documentary records produced. CPLR §3212 (b); See ***Grimaldi v. Pagan***, 135 AD2d 496, 521 NYS2d 736 (2nd Dept. 1987).

As the Court noted in ***Andre v. Pomeroy***, 36 NY2d 131, 362 NYS2d 131, 133 (1974):

> "[1-3] Summary judgment is designed to expedite all civil cases by eliminating from the trial calendar claims which can properly be resolved as a matter of law. Since it deprives the litigant of his day in court it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues

(***Millerton Agway Co-op v. Briarcliff Farms***, 17 N.Y.2d 67, 268 N.Y.S.2d 18, 215 N.E.2d 341). But when there is no genuine issue to be resolved at trial, the case should be summarily decided and an unfounded reluctance to employ the remedy will only serve to swell the Trial Calendar and thus deny to other litigants the right to have their claims promptly adjudicated."

Accordingly, the plaintiff Samuel B. Antwi, is granted judgment in the amount of $50,000 plus interest from the date of judgment and costs and disbursements associated with this action as against the defendant, William Spence only and the action is dismissed as against Armor Records after a review of the record.

The foregoing constitutes the decision of the Court.

Dated: November 27, 2007

J.S.C.